IN THE

Supreme Court of the United States

October Term, 1960

No. ~~618~~ 27

MARY BRISCOE, *et al.*,

Petitioners,

—v.—

STATE OF LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above-entitled case on October 5, 1960.

Citations to Opinions Below

The opinions below are not reported. The Nineteenth Judicial District Court, State of Louisiana, Parish of East Baton Rouge, rendered an oral opinion which is set forth in the Statement, *infra*, page 6. The Supreme Court of Louisiana entered a brief handwritten opinion which is also set forth, *infra*, page 10.

Jurisdiction

The judgment of the Supreme Court of Louisiana was entered on October 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3), petitioners claiming rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

Petitioners, Negro students, sat down and sought food service at a lunch counter which served only white people in a public establishment which welcomed their trade without racial discrimination at all counters but that lunch counter; for this they were arrested and convicted under the provisions of a law proscribing conduct "in such a manner as to unreasonably disturb or alarm the public"; and there was no evidence of any disorder, disturbance of the peace, or public alarm. Under the circumstances, were petitioners deprived of rights protected by the:

1. due process clause of the Fourteenth Amendment in that they were convicted on a record barren of any evidence of guilt;

2. due process clause of the Fourteenth Amendment in that they were convicted under a penal provision which was so indefinite and vague as to afford no ascertainable standard of criminality;

3. due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in that they were arrested and convicted to enforce racial discrimination;

4. due process clause of the Fourteenth Amendment, as that clause incorporates First Amendment type protection of liberty of expression?

Statutory and Constitutional Provisions Involved

1. The Fourteenth Amendment to the Constitution of the United States.

2. The Louisiana statutory provision involved is LSA-R.S. 14:103:

> "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
>
> (1) Engaging in a fistic encounter; or
>
> (2) Using of any unnecessarily loud, offensive, or insulting language; or
>
> (3) Appearing in an intoxicated condition; or
>
> (4) Engaging in any act in a violent and tumultuous manner by three or more persons; or
>
> (5) Holding of an unlawful assembly; or
>
> (6) Interruption of any lawful assembly of people; or
>
> (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public.
>
> Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars, or imprisoned for not more than ninety days, or both."

Statement

This is one of three petitions[1] filed here this day involving cases decided on identical grounds by the Supreme Court of Louisiana on October 5, 1960. The questions presented are identical and the factual situations from which they stem are in relevant particulars almost entirely the same. In each criminal prosecution, the State of Louisiana, initially acting through Captain Robert Weiner of the Baton Rouge City Police and other police officers including, on one occasion a major of the police and on another occasion the Chief, arrested petitioners, who were students at Southern University, for violating a state statute, LSA-R.S. 14:103(7), which makes criminal "any other act" committed "in such a manner as to unreasonably disturb or alarm the public." Petitioners in each case, respectively, merely requested nonsegregated service at three different public lunch counters in stores where otherwise they were welcome as customers. No disturbances in fact occurred in any of the three cases. Petitioners in each case were tried on criminal informations which disclosed their race and were convicted and sentenced to imprisonment of four months, three months of which might be suspended upon payment of a fine of $100.00 and costs.

On March 29, 1960, petitioners in the instant case, students at Southern University (RT 2),[2] presented themselves as patrons at a lunch counter in the Baton Rouge

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[1] The other two petitions seek review of the following decisions of the Supreme Court of Louisiana: *State of Louisiana* v. *John B. Garner, et al.*, Nos. 45,214 and 45,338; *State of Louisiana* v. *Jannette Hoston*, Nos. 45,337 and 45,213.

[2] "RT" refers to the trial record and application for review thereof. "RQ" refers to the record on the motion to quash and application for review thereof.

Greyhound Bus Station (RT 10). The waitress told them that as Negroes "they would have to go to the other side to be served . . . (RT 11). [W]e are supposed to refuse the service of anyone that comes in there that is not supposed to be on that side" (RT 11) and "[t]he colored people are supposed to be on the other side" (RT 11). The only posted sign announced, "Refuse service to anyone" (RT 12).

Petitioners "just kept sitting there and they said they wanted something. . . ." (RT 11). They did not do anything else (RT 14): "The only reason [she] asked them to leave is because they were Negroes" (RT 12). Another "place [was] reserved for colored people in this same building" (RT 14). "[S]o we called the police," the waitress testified, "and told them to come get them" (RT 11).

Police Captain Robert Weiner, who made the arrests in the *Garner* and *Hoston* cases filed here this day, and Major Bauer, Inspector of the Police Department, proceeded to the bus station with other officers and saw petitioners sitting at the lunch counter reserved for white people (RT 15-16).

He asked them to move but they remained seated, saying nothing (RT 16). When placed under arrest, however, "They came along peacefully" (RT 17).

The Captain stated that petitioners were arrested because "according to the law, in my opinion, they were disturbing the peace" (RT 17). He explained, saying, "the fact that their presence was there in the section reserved for white people, I felt that they were disturbing the peace of the community" (RT 18). They were "disturbing the peace," he said, "by the mere presence of their being there" (RT 20).

The informations filed against petitioners disclosed their race by the notation "(CF)" or "(CM)," (RT 1, 2), i.e., colored female or colored male.

After motions to quash and assertions of various defenses under the Fourteenth Amendment to the Constitution of the United States, set forth in detail *infra*, page 7, a trial was had and on the evidence set forth above petitioners were convicted. Following the close of the testimony, the trial judge rendered an oral opinion (RT 20-21):

> All of the accused stand up. The State has introduced testimony of two witnesses in this case which is not disputed at all by the defense. In fact there is no evidence by the defense, and under this Article 103, Section 7, the one that they are charged under, it is the decision of the Court that they are guilty as charged for the reason that from the evidence in this case their actions in sitting on stools in this place of business when they were requested to leave and they refused to leave; the officers were called, the officers requested them to leave and they still refused to leave, their actions in that regard in the opinion of the Court was an act on their part as would unreasonably disturb and alarm the public. The Court is convinced beyond a reasonable doubt from the testimony in the case that these accused are guilty as charged.

Motion for new trial was made and denied. Application for writs of certiorari, mandamus and prohibition was filed in the Supreme Court of Louisiana and denied (RT 37). Application for stay of execution for 60 days was granted by the Chief Justice of the Louisiana Supreme Court on October 7, 1960, which later was extended until January 6, 1961.

How the Federal Questions Are Presented

The federal questions sought to be reviewed here were raised in the court of first instance (the Nineteenth Judicial District Court, Division A) on April 27, 1960, by petitioners' timely motion to quash the information (RQ 8-11). In this motion, aside from variously alleging that the information charged no offense under Louisiana's "disturbing the peace" statute, petitioners averred (RQ 9):

> 5. That if said Statute, LSA-R. S. 14:103 of 1950, as amended, does embrace within its terms and meanings that "the defendants' mere refusal to move from a cafe counter seat when ordered to do so by an agent or any other person or persons of the said Greyhound Restaurant constitutes a disturbance of the peace," then, and in that event said Statute, LSA-R. S. 14:103, is unconstitutional, in that, it deprives your defendants of their privileges, immunities and/or liberties, without due process of law and denies them the equal protection of the laws guaranteed by the Fourteenth (14th) Amendment to the Constitution of the United States of America.
>
> 6. That while the arrests and charges were for "DISTURBING THE PEACE," there was not a disturbance of the peace, except for the activity in which defendants engaged to protest segregation, and that the use of the criminal process in such a situation denies and deprives the defendants of their rights, privileges, immunities and liberties guaranteed your defendants, each, citizens of the United States, by the Fourteenth (14th) Amendment to the Constitution of the United States of America.

The motion was argued, submitted and denied on April 29, 1960, to which ruling petitioners objected, reserved a formal bill of exceptions and gave written notice of their intention to apply to the State Supreme Court for writs of certiorari, mandamus and prohibition (RQ 13, 15). The bill of exceptions was signed by the trial judge on May 6 (RQ 17) and this application, which was presented to the Supreme Court of Louisiana on the same day (RQ 18-22) urged (RQ 19, 20):

> 3. That while the arrests and charges were for "DISTURBING THE PEACE," there was not a disturbance of the peace, except for the activity in which relators engaged to protest racial segregation and that the use of the criminal process in such a situation denies and deprives the relators of their rights, privileges, immunities and liberties guaranteed to them, each, citizens of the United States, by the Fourteenth Amendment to the Constitution of the United States of America.
>
> 4. That the refusal of your relators to move from a cafe counter seat at Greyhound Restaurant in obedience of an order by an agent thereof is not a crime embraced within the terms and meanings of LSA-R. S. 14:103(7) of 1950, as amended, and if said act is a crime within the terms and meaning of said Statute, then and in that event, said Statute is sufficiently vague to render it unconstitutional on its face, thus, depriving your relators of their rights, privileges, immunities and/or liberties without due process of law and denies them the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.
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> • • • • •
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> 6. That, thus, the relief which your relators seek herein under the Application for Writs of Certiorari,

> Mandamus and Prohibition, should be granted by this Honorable Court, in that the Statute and Bill of Information under which your relators are charged, both, are insufficient to charge a crime, otherwise your relators be deprived of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

This application for writs of certiorari, mandamus and prohibition was denied on May 9 with a notation that "Relators have an adequate remedy under our Supervisory Jurisdiction in the event of a conviction" (RQ 28). Thereafter, petitioners applied for and were summarily denied a rehearing on May 24 (RQ 29-30, 33).

Petitioners' case came on for trial on June 2, 1960, at which time their counsel stated for the record that "they wished to reserve any and all rights they may have under the writs of certiorari, mandamus and prohibition would like to renew all reservations and motions previously that have been denied" (RT 3).

Petitioners were found guilty as charged (RT 3) and, on June 5, they filed a motion for new trial which alleged, *inter alia* (RT 24):

> That the said verdict is contrary to the law and evidence in that it is repugnant to and in violation of Article I, Sections 2 and 3 of the Constitution of Louisiana of 1921, and also repugnant to and in violation of the First and Fourteenth Amendments to the Constitution of the United States; that said verdict deprives the said defendants of their freedom of speech, liberties, privileges, immunities, due process and equal protection of the law as guaranteed by the provisions

of the Constitution of the State of Louisiana and of the United States of America, respectively.

This motion was denied (RT 4) and petitioners filed forthwith a bill of exceptions, renewing all reservations, motions and bills of exceptions previously taken (RT 6-7).

Thereafter, on July 20, 1960, petitioners applied to the Supreme Court of the State for writs of certiorari, prohibition and mandamus (RT 26-29) which incorporated by reference their previous applications for such writs (RT 26) and also urged that the verdict and sentence of the trial court are "repugnant to and in violation of . . . the First and Fourteenth Amendments to the Constitution of the United States, depriving relators of their freedom of speech, liberties, privileges, immunities, due process and equal protection of the laws as constitutionally guaranteed all citizens of the State of Louisiana and of the United States" (RT 27).

The Supreme Court of Louisiana denied this application on October 5, 1960, stating (RT 36):

> Writs refused.
>
> This Court is without jurisdiction to review facts in criminal cases. See Art. 7, Sec. 10, La. Constitution of 1921.
>
> The rulings of the district judges on matters of law are not erroneous. See Town of Pontchatoula v. Bates, 173 La., 824, 138 So. 851.

Reasons for Granting the Writ

I.

The Decision Below Conflicts With Decisions of This Court on Important Issues Affecting Federal Constitutional Rights.

A. The decision below affirms a criminal conviction based upon no evidence of guilt and therefore conflicts with this Court's decision in *Thompson* v. *City of Louisville*, 362 U.S. 199.

The trial court reached the following conclusion on the evidence presented at trial, which is detailed in the Statement of Facts, *supra*:

> . . . it is the decision of the Court that they are guilty as charged for the reason that from the evidence in this case their actions in sitting on stools in this place of business when they were requested to leave and they refused to leave; the officers were called, the officers requested them to leave and they still refused to leave, their actions in that regard in the opinion of the Court was an act on their part as would unreasonably disturb and alarm the public. The Court is convinced beyond a reasonable doubt from the testimony in the case that these accused are guilty as charged (RT 21).

It is submitted that none of the evidence presented affords any basis for this conclusion and determination of guilt, if any conventional meaning is given to the words of the statute.[3] The Supreme Court of Louisiana apparently regarded

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[3] In pertinent part the statute provides:

"Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:

* * * * *

(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

itself as inhibited from re-examining the factual basis for the determination of guilt,[4] but under traditional principles this Court makes its "own independent examination of the record" where facts and constructions are determinative of federal constitutional rights. *Napue* v. *Illinois,* 360 U.S. 264, 271, 272.[5]

The record simply shows that petitioners, Negroes, quietly and peacefully took seats at a lunch counter which served only white people and requested food service; that they were advised by the waitress that Negroes were supposed to be at another counter and asked to leave; and that they remained seated at the counter. There was no argument or altercation with the waitress (or anyone else); none of the other customers in the store complained about petitioners' presence.

A police major and police captain arrived, requested that petitioners leave, and then arrested petitioners on the ground, stated by Captain Weiner, that petitioners were violating the law and disturbing the peace because "the fact that their presence was there in the section reserved for white people, I felt that they were disturbing the peace of the community" (RT 18).

There was no testimony in the record that anyone was alarmed or disturbed, no testimony that any disorder or disturbance actually occurred, and no testimony that anyone even feared or apprehended that a disorder might occur. Thus there was absolutely nothing in the record to

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[4] See opinion below, RT 33.

[5] It is well settled that this Court will "decide for itself facts or constructions upon which federal constitutional issues rest"; *Napue* v. *Illinois,* above. See *Spano* v. *New York,* 360 U.S. 315, 316; *Norris* v. *Alabama,* 294 U.S. 587; *Niemotko* v. *Maryland,* 340 U.S. 268, 271; and the many cases collected in *Napue,* at 360 U.S. 264, 272, note 4.

support the conclusion that petitioners did anything "in a manner calculated to" disturb or alarm the public, or that the public was "actually" alarmed or disturbed, and the trial court's opinion said only that their acts "*would* unreasonably disturb or alarm the public" (emphasis supplied).

Thus this case is like *Thompson* v. *City of Louisville*, 362 U.S. 199, and should have been decided on the same principles applied in that case. In the *Thompson* case the petitioner had been convicted of disorderly conduct and loitering. The evidence showed essentially that the petitioner had been out on the dance floor of a cafe alone for about half an hour awaiting a bus (on this the loitering charge was based), and that when he was arrested for loitering he argued with the police (on which the disorderly conduct charge was based). This Court held the convictions void as having been based on no evidence and, therefore, violative of the due process clause of the Fourteenth Amendment. Here, as in *Thompson*, "there is no support for these convictions in the record . . . " (362 U.S. at 204), and, therefore, the convictions are "void as denials of due process" (*Ibid.*). There is in the instant suit, as the *Thompson* opinion reiterated, "no evidence whatever in the record to support these convictions" (*Ibid.*). [J]ust as "conviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt (*Id.* at 206).

The judgment below conflicts sharply with the law as this Court declared it in *Thompson*. A full hearing, therefore, should be granted so that this Court may consider the grave constitutional issue posed by this contradiction.

B. Petitioners were convicted of a crime under the provisions of a state statute which as applied to convict them is so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment as construed in applicable decisions of this Court.

The information filed in this case charges petitioners with having violated "Article 103 (Section 7) of the Louisiana Criminal Code" (R. 1). Subsection 7 of The Statute invoked (LSA R.S. §14-103) prohibits the "Commission of any other act in such a manner as to unreasonably disturb or alarm the public." As is evident from the discussion in the preceding section of this petition, no conventional understanding of the meaning of the words of the statute explains or supports the determination of guilt on the present record. Whether or not the statute has been read by the Court below to give it any esoteric meaning which is not plain from a reading of the statute, it is plain that it is unconscionably vague and indefinite.[6]

It may be observed that subsection 7, the catch-all part of the law, has not been applied in this case in accordance with the maxim *ejusdem generis*, for petitioners were convicted even though they committed no acts of the same character as those specifically prohibited in the six specific subsections. It is plain that petitioners did not (1) engage "in a fistic encounter", (2) use "any unnecessarily loud, offensive, or insulting language", (3) appear "in an intoxicated condition", (4) engage "in any act in a violent and tumultuous manner by three or more persons", (5) hold "an

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[6] The grammatical construction of subsection 7, viz., "to unreasonably disturb or alarm the public"—opens the door to further confusion and vagueness. Query: Is the act violated when the public "unreasonably" becomes disturbed or alarmed, or when an unreasonable act disturbs or alarms the public? In any event the record fails to show that anyone was disturbed or alarmed.

unlawful assembly", or (6) interrupt "any lawful assembly of people", but they were nevertheless adjudged guilty.

Prior decisions of the Supreme Court of Louisiana do nothing to elucidate how the diffuse command of the catch-all section 7 prohibits and makes criminal acts such as petitioners'. The case cited by the Court below, *Town of Pontchatoula* v. *Bates*, 173 La. 824, 138 So. 851 (1931), states that "a disturbance of the peace may be created by any act or conduct of a person which molests the inhabitants in the enjoyment of that peace and quiet to which they are entitled, or which throws into confusion things settled, or which causes excitement, unrest, disquietude, or fear among persons of ordinary, normal temperament." On the other hand, in the most recent decision of the Louisiana Supreme Court dealing with this section, *State* v. *Sanford*, 203 La. 961, 14 So. 2d 778 (1943), the Court held that when Jehovah's Witnesses were charged under subsection 7 with having disturbed the peace by distributing literature in the course of their activities, the conviction should be reversed where the record indicated that they were "orderly and did not tend to cause a disturbance of the peace." In that case the court expressed its view that if the statute were applied to the activities in question it might be invalid for vagueness:

> ". . . to construe and apply the statute in the way the district judge did would seriously involve its validity under our State Constitution, because it is well settled that no act or conduct, however reprehensible, is a crime in Louisiana, unless it is defined and made a crime clearly and unmistakably by statute. . . . It is our opinion that the statute is inapplicable to this case because it appears that the defendants did not commit any unlawful act or pursue an unlawful or disorderly course of conduct which would tend to disturb the peace" (14 So. 2d at 781).

Only when the statute is viewed in the light of the arresting officers' theory of the crime, namely that the Negro petitioners committed a crime merely by sitting at a lunch counter reserved for white people, does the real basis of the arrest and conviction emerge. But such a construction and application of the statute is unfair because the statute gives no warning that petitioners' mere act of sitting at a lunch counter reserved for white people and requesting food service is criminally punishable.

Subsection 7 is so broad and vague that definition of the actions which may be punished is effectively relegated to the police, and ultimately to the Courts for *ad hoc* determination after the fact in every case. There is no readily ascertainable standard of criminality or guilt.

This Court has often held that criminal laws must define crimes sought to be punished with sufficient particularity to give fair notice as to what acts are forbidden. As the Court held in *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453, "no one may required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what crimes are forbidden." See also, *United States* v. *L. Cohen Grocery,* 255 U.S. 81, 89; *Connally* v. *General Const. Co.,* 269 U.S. 385; *Raley* v. *Ohio,* 360 U.S. 423. The statutory provision applied to convict petitioners in this case is so vague that it offends the basic notions of fair play in the administration of criminal justice that are embodied in the due process clause of the Fourteenth Amendment.

Moreover, the statute punished petitioners' protest against racial segregation practices and customs in the community; for this reason the vagueness is even more invidious. When freedom of expression is involved the principle that penal laws may not be vague must, if anything, be enforced even more stringently. *Cantwell* v.

Connecticut, 310 U.S. 296, 308-311; *Scull* v. *Virginia*, 359 U.S. 344; *Watkins* v. *United States*, 354 U.S. 178; *Herndon* v. *Lowry*, 301 U.S. 242, 261-264.

As this Court stated in *Winters* v. *New York*, 333 U.S. 507, 520, a case where the court invalidated a state law applied to limit free expression on the grounds of vagueness: "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained". In this case the state has indiscriminately classified and punished innocent actions as criminal. The result is an arbitrary exercise of the state's power which offends due process. *Wieman* v. *Updegraff*, 344 U.S. 183, 191.

C. The decision below conflicts with prior decisions of this Court which condemn racially discriminatory administration of State criminal laws.

It is plain on the face of the record from the testimony of the State's own witnesses that petitioners were arrested merely because they were Negroes and sought food service at a lunch counter maintained for white persons. The petitioners' race was the only basis for the police officers' command that they leave the seats which they occupied at the lunch counter, and for the arrests which followed failure to follow this command. Both the arrests and convictions rest on the theory that petitioners violated the state law by their mere presence as Negroes, at the white lunch counter. The criminal accusation itself specifically identifies petitioners' race.

As long ago as *Gibson* v. *Mississippi*, 162 U.S. 565, a case involving a claim of discrimination in jury procedures, this Court stated the broad proposition that racial discrimination in the administration of criminal laws violates the Fourteenth Amendment. The court said at 162 U.S. 565, 591:

> "The guaranties of life, liberty, and property are for all persons within the jurisdiction of the United States or of any state, without discrimination against any because of their race. *Those guaranties*, when their violation is properly presented in the regular course of proceedings, *must be enforced in the courts, both of the nation and of the state, without reference to considerations based upon race. In the administration of criminal justice no rule can be applied to one class which is not application to all other classes.* (Emphasis supplied.)

This Court has repeatedly struck down statutes and ordinances which provided criminal penalties to enforce racial segregation. *Buchanan* v. *Warley*, 245 U.S. 60; *Holmes* v. *City of Atlanta*, 350 U.S. 879; *Gayle* v. *Browder*, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala. 1956); *State Athletic Commission* v. *Dorsey*, 359 U.S. 533, affirming 168 F. Supp. 149 (E.D. La. 1958), were all cases in which criminal laws used to maintain segregation were invalidated. Cf. *Evers* v. *Dwyer*, 358 U.S. 202. Likewise, in *Yick Wo* v. *Hopkins*, 118 U.S. 356, the Court nullified a criminal prosecution under a statute which was fair on its face but was being administered to effect a discrimination against a single ethnic group.

While it may be argued by the State that in this case the racial discrimination against petitioners is beyond the reach of the Fourteenth Amendment because it originated with the decision of a "private entrepreneur" to establish a "white-only" lunch counter in deference to local customs and traditions, this is not dispositive of the case because it is racial discrimination by agents of the State of Louisiana, i.e., the police, which affords the primary basis for these prosecutions. It was the police officers acting as law enforcement representatives of the State who com-

manded petitioners to leave their seats at the lunch counter because petitioners were Negroes and the counter was maintained for white people. It was the police officers who arrested petitioners for failure to obey this command. It was the public prosecutor who charged petitioners with an offense, and it was the State's judiciary that convicted and sentenced them. Thus, from the policeman's order, the conviction and punishment, the State was engaged in enforcing racial segregation with all of its law enforcement machinery.

This racial discrimination may fairly be said to be the product of state action within the reach of the Fourteenth Amendment which "nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Civil Rights Cases*, 109 U.S. 3, 11. As stated by the Court in *Cooper* v. *Aaron*, 358 U.S. 1, 17:

> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, . . . [citing cases] . . . ; or whatever the guise in which it is taken, . . . [citing cases]."

Just as judicial enforcement of racially restrictive covenants was held to constitute state action in violation of the Fourteenth Amendment in *Shelley* v. *Kraemer*, 334 U.S. 1, and *Barrows* v. *Jackson*, 346 U.S. 249, so in this case judicial enforcement of a rule of racial segregation in privately owned lunch counters operated as business property opened up for use by the general public should likewise be condemned.

Unlike *Marsh* v. *Alabama*, 326 U.S. 501, and *Boynton* v. *Virginia*, —— U.S. ——, 5 L. ed. 2d 206, this is not a "trespass" prosecution involving a collision of property rights and personal rights, for it was the police officer's demand that petitioners leave their seats, based upon the officer's determination that they violated the law by their very presence in the seats, that formed the basis for conviction.[1]

Here petitioners, as welcome customers in a business establishment open to the public, sought to obtain food service at a lunch counter set aside for white persons. They were prevented from pursuing their peaceful requests for service by the intervention of the police officers bent upon enforcing racial segregation.

The police officer's demand that petitioners leave their seats because of the racial segregation customs and the subsequent arrests based on this demand deprived petitioners of the equal protection of the laws. A similar arrest was said to be an illegal deprivation of civil rights by police officers in *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960), quoting from the decision below *sub nom. Boman* v. *Morgan* (N.D. Ala. 1959, C.A. No. 9255), 4 Race Relations Law Reporter 1027, 1031 (otherwise unreported):

> "A charge of 'a breach of the peace' is one of broad import and may cover many kinds of misconduct. However, the Court is of the opinion that the mere refusal to obey a request to move from the front to the rear of a bus, unaccompanied by other acts constituting a breach of the peace, is not a breach of the

[1] But even if the case is measured in terms of criminal trespass provisions like those in *Marsh*, *supra*, the language of the Court in that case is apt. See p. 23, *infra*, and cases cited at that point.

peace. In as far as the defendants, other than the Transit Company, are concerned, plaintiffs were in the exercise of rights secured to them by law.

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"Under the undisputed evidence, plaintiffs acted in a peaceful manner at all times and were in peaceful possession of the seats which they had taken on boarding the bus. Such being the case, *the police officers were without legal right to direct where they should sit because of their color.* The seating arrangement was a matter between the Negroes and the Transit Company. It is evident that the arrests at the barn were based on the refusal of the plaintiffs to comply with the request to move since those who did move, though equally involved except as to compliance, were not arrested.

"Under the facts in this case, *the officers violated the civil rights of the plaintiffs in arresting and imprisoning them.* Ordinance 1487-F, and their 'willful' refusal to move when directed to do so, did not authorize or justify their conduct." (Emphasis supplied.)

It is submitted that the use of the criminal laws of the states to enforce racial segregation and discrimination presents a grave challenge to the integrity of our system of criminal justice in the United States. Because, unfortunately, arrests and convictions based upon racial considerations are not uncommon,* it is all the more important that this Court should exercise continued vigilance in protecting civil rights in such cases. For this reason it is submitted that this case presents a question of public importance which merits plenary review by this Court.

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* See II, *infra*.

D. The decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to freedom of expression.

Petitioners were requesting service at public lunch counters in establishments where their trade was welcome, except that they were not permitted to sit at counters reserved for white persons—and for this, and this alone, they were arrested. Their presence at these counters expressed in Baton Rouge what thousands of other Negro students have been manifesting throughout the nation—dissatisfaction with being relegated to second class status in public establishments which accept on an equal basis their trade at all counters except lunch counters; there racial segregation prevails.

As the motion to quash in each of these three cases stated, "your defendants, each, in protest of the segregation laws of the State of Louisiana, did . . . 'sit in' a cafe counter seat reserved for members or persons of the White race, and for which activity your defendants, each, were arrested . . .".

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is hardly limited to verbal utterances. It covers picketing, *Thornhill* v. *Alabama,* 310 U.S. 88; free distribution of handbills, *Martin* v. *Struthers,* 319 U.S. 141; display of motion pictures, *Burstyn* v. *Wilson,* 343 U.S. 495; joining of associations, *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449; the display of a flag or symbol, *Stromberg* v. *California,* 283 U.S. 359. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication.

These "sit ins" occurred in places entirely open to the public and to petitioners as well. That the premises were privately owned should not detract from the high constitu-

tional position which such free expression deserves. This is hardly a case involving, for example, expression of views in a private home or other restricted area private in nature. The establishment here, as in the other two petitions presented today, were open to the public and the patronage of the public, including that of Negroes, was sought.

Marsh v. *Alabama*, 326 U.S. 501, 506, rejected argument that being present upon private property *per se* divests a person of the constitutional right of free expression:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .

In that case, therefore, this Court held unconstitutional convictions of Jehovah's Witnesses for trespass for proselytizing on private property of a company town. See also, *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801, note 6; *National Labor Relations Board* v. *Babcock and Wilcox Co.*, 351 U.S. 105, 112; *United Steelworkers* v. *National Labor Relations Board*, 243 F. 2d 593, 598 (D.C. Cir. 1956), *rev. on other grounds*, 357 U.S. 357; *People* v. *Barisi*, 193 Misc. 934, 86 N.Y.S. 2d 277, 279 (1948); *Freeman* v. *Retail Clerks Union*, 45 Lab. Rel. Ref. Man. 2334 (Wash. Super. Ct. 1959).

These decisions, of course, are manifestations of the fundamental view, stated in *Munn* v. *Illinois*, 94 U.S. 113, 126, that "when . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. . . ."

Although in the case now at bar there was no evidence of anything remotely resembling breach of the peace, *Cantwell* v. *Connecticut* held in invalidating a conviction for inciting breach of the peace, "obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." 310 U.S. 296, 308. "Here," Justice Roberts wrote, "we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." Id. at 308. Therefore, ". . . in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." Id. at 311.

Indeed, in the *Cantwell* case there was evidence that defendants' acts had provoked some hostility. That is not the situation in the instant case. But even if petitioners here had stirred unrest by their demonstration, this is precisely the type of expression that the freedom of speech guarantee of the Constitution is supposed to protect.

Terminiello v. *Chicago*, 337 U.S. 1, 4, held that:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound un-

> settling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra (315 U.S. pp. 571, 572, 86 L. ed 1034, 1035, 62 S. Ct. 766), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

As Justice Holmes wrote for a unanimous Court in *Schenck* v. *United States,* 249 U.S. 47, 52:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent.

In the context of this record the State apparently asserts the power to prevent two evils, as it views them: (1) disturbance of the peace—but the record offers no support for an inference that any such danger was present in any degree; (2) nonsegregation at lunch counters—but the State has no power to compel segregation. See *Brown* v. *Board of Education,* 347 U.S. 483; *State Athletic Commission* v. *Dorsey,* 359 U.S. 533, affirming 168 F. Supp. 149 (E.D. La. 1918). Therefore, having no valid interest to preserve, the State has no power to impose criminal penalties for the expression in which petitioners here engaged.

II.

The Public Importance of the Issues Presented

A. This case presents issues posed by numerous similar demonstrations throughout the nation which have resulted in widespread desegregation and also in many similar cases now pending in state and federal courts. Petitioners need not multiply citations to demonstrate that during the past year thousands of students throughout the nation have participated in demonstrations like those for which petitioners have been convicted.

A comprehensive description of these "sit-in" protests appears in Pollitt, Dime Store Demonstration: Events and Legal Problems of the First Sixty Days, 1960 Duke Law Journal 315 (1960). These demonstrations have occurred in Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, Texas, Virginia and elsewhere. *Pollitt, supra, passim.*

In a large number of places, this nationwide protest has prompted startling changes at lunch counters throughout the South, and service is now afforded in many establishments on a nonsegregated basis. The Attorney General of the United States has announced the end of segregation at public lunch counters in 69 cities, *New York Times,* August 11, 1960, page 14, col. 5 (late city edition), and since that announcement the number of such cities has risen above 112, *New York Times,* Oct. 18, 1960, page 47, col. 5 (late city edition).

In many instances, however, these demonstrations, as in the case at bar, have resulted in arrests and criminal prosecutions which, in their various aspects, present as a fundamental issue questions posed here, that is, may the state use its power to compel racial segregation in private estab-

lishments which are open to the public and to stifle protests against such segregation. Such cases having been presented to the Supreme Court of Appeals of Virginia,[9] the Supreme Court of North Carolina,[10] the Supreme Court of Arkansas,[11] the Court of Criminal Appeals of Texas,[12] the Court of Appeals of Alabama,[13] the Court of Appeals of Maryland,[14] several South Carolina appellate courts,[15] and the Georgia Court of Appeals.[16] Numerous other cases are pending at the trial level.

It is, therefore, of widespread public importance that the Court consider the issues here presented so that the lower courts and the public may be guided authoritatively with

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[9] *Raymond B. Randolph, Jr.* v. *Commonwealth of Va.* (No. 5233, 1960).

[10] *State of N. C.* v. *Fox and Sampson* (No. 442, Supreme Court, Fall Term 1960).

[11] *Chester Briggs, et al.* v. *State of Arkansas* (No. 4992) (consolidated with *Smith* v. *State of Ark.*, No. 4994, and *Lupper* v. *State of Ark.*, No. 4997).

[12] *Briscoe* v. *State of Texas* (Court of Crim. App., 1960, No. 32347) and related cases (decided Dec. 14, 1960; conviction reversed on ground that indictment charging in alternative invalid for vagueness).

[13] *Bessie Cole* v. *City of Montgomery* (3rd Div. Case No. 57) (together with seven other cases, Case Nos. 58-64).

[14] *William L. Griffin, et al.* v. *State of Maryland*, No. 248, September Term 1960 (two appeals in one record); see related civil action sub nom. *Griffin, et al.* v. *Collins, et al.*, 187 F. Supp. 149 (D.C. D.Md. 1960).

[15] *City of Charleston* v. *Mitchell, et al.* (Court of Gen. Sess. for Charleston County) (appeal from Recorders Ct.); *State* v. *Randolph, et al.* (Court of Gen. Sess. for Sumter County) (appeal from Magistrates Ct.); *City of Columbia* v. *Bouie, et al.* (Court of Gen. Sess. for Richland County) (appeal from Recorders Ct.).

[16] *M. L. King, Jr.* v. *State of Georgia* (two appeals: No. 38648 and No. 38718).

respect to the constitutional limitations on state prosecutions for engaging in this type of protest.

B. The holding below, if allowed to stand, will in effect undermine numerous decisions of this Court striking down state enforced racial discrimination. For example, the discrimination on buses interdicted by the Constitution in *Gayle* v. *Browder*, 352 U.S. 903, aff'g 142 F. Supp. 707, could be revived by convictions for disturbing the peace. In the same manner, state enforced prohibitions against members of the white and colored races participating in the same athletic contests, outlawed in *Dorsey* v. *State Athletic Commission*, 168 F. Supp. 149, aff'd 359 U.S. 533, could be accomplished. Indeed, segregation of schools, forbidden by *Brown* v. *Board of Education*, 347 U.S. 483, and innumerable cases decided since that time, especially those affecting Louisiana, e.g., *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), cert. denied 354 U.S. 921, might also be accomplished by prosecutions for disturbing the peace even though no disturbances in fact occurred.

The holding below, if allowed to stand, would be completely subversive of the numerous decisions throughout the federal judiciary outlawing state enforced racial distinctions. Indeed, the segregation here is perhaps more invidious than that accomplished by other means for it is not only based upon a vague statute which is enforced by the police according to their personal notions of what constitutes a violation and then sanctioned by state courts but it suppresses freedom of expression as well.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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